JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

Helmut Schleich v Peri Formwork (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22-NCC-1245 OF 2011
MARY LIM J
26 MARCH 2012

Contract — Interpretation — Objective intention of contracting parties — Former employee of company engaged to recover debts to company from projects in return for commission on sums recovered — Whether parties contemplated agreement to include monies already received by company from projects before agreement made — Whether monies received prior to agreement were not 'debts'

The plaintiff was the managing director of the defendant for 11 years before he left the company under a mutual separation agreement. To recover substantial trade debts owing to the defendant from its various customers and which had been incurred during the plaintiff's tenure with the company ('old debts'), the defendant agreed in a letter ('the Side Letter') to pay the plaintiff 15% commission on all old debts he recovered for the defendant within a one-year period. Mid-way through the implementation of the Side Letter, the defendant sought the plaintiff's assistance to recover other heads of loss the company had suffered under two specific projects, namely, the Park 7 and Troika projects. The parties entered into a supplementary agreement ('SA') under which the plaintiff was to be paid the same rate of commission for the 'complete' collection of outstanding amounts under the two projects over their 'full duration', specifically, 'all funds in respect of rental, purchase, transport, cleaning/damage charges and sale by loss (lost equipment)'. The plaintiff interpreted the terms 'complete' and 'full duration' to mean the parties had agreed he was to be paid 15% commission on the complete collections received from both the Park 7 and Troika projects over their full duration. This would have included collections received from the outset of those projects even before the Side Letter and the SA came into existence. Based on his interpretation the plaintiff invoiced the defendant for his commission but when the defendant failed to respond to reminders for payment he filed the instant suit.

Held, dismissing the claim with costs:

(1) The parties did not and could not have intended to include collections which had already been made in respect of the Park 7 and Troika projects because those collections were no longer 'debts'. The relevant dues had already been paid and collected by the defendant. The purpose of the collaboration between the parties at all times was about debt collection.

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

As such, the matter of monies already collected prior to the SA and the Side Letter could not have been within the contemplation of the parties (see para 45).

(2) The scope or purpose of the SA was to amend the then existing agreement in the Side Letter. Since the list of old debts in the Side Letter already included invoiced monies which were due under both the Park 7 and Troika projects, the terms 'complete' and 'over the full duration' could only refer to materials and items which were lost, damaged, had not been returned or had not been paid for by the customers over the full duration of those projects. There was no confusion or doubt in either party's minds as to the subject-matter under negotiation and decision (see paras 32 & 44).

(3) Nowhere in the plaintiff's own testimony did he assert or claim that the defendant represented and agreed with him that he was to be paid even for collections already collected. That being the case, it surely could not have been the subject of any bargain or agreement (see para 46).

[Bahasa Malaysia summary

Plaintif adalah pengarah urusan defendan selama 11 tahun sebelum dia meninggalkan syarikat di bawah perjanjian pemisahan bersama. Untuk mendapatkan kembali hutang perniagaan substansial yang terhutang kepada defendan daripada pelbagai pelanggannya dan yang mana telah ditanggung semasa plaintif memegang jawatan dengan syarikat ('hutang lapuk'), defendan bersetuju di dalam surat ('Surat Sampingan') untuk membayar plaintif komisen sebanyak 15% atas kesemua hutang lapuk yang diperolehinya untuk defendan dalam tempoh masa satu tahun. Pertengahan jalan semasa pelaksanaan Surat Sampingan tersebut, defendan memohon pertolongan plaintif untuk mendapatkan tajuk kerugian lain yang ditanggung oleh syarikat di bawah dua projek spesifik, terutamanya, Park 7 dan projek-projek Troika. Pihak-pihak memasuki perjanjian tambahan ('PT') di mana plaintif dikehendakki membayar kadar komisen yang sama untuk 'complete' jumlah pungutan tertunggak di bawah kedua-dua projek tersebut ke atas 'full duration' mereka, khususnya, 'all funds in respect of rental, purchase, transport, cleaning/damage charges and sale by loss (lost equipment)'. Plaintif mentafsirkan terma-terma 'complete' dan 'full duration' untuk bermaksud pihak-pihak telah bersetuju yang dia dibayar komisen sebanyak 15% atas pungutan lengkap yang diterima daripada kedua-dua Park 7 dan projek-projek Troika ke atas tempoh penuh mereka. Ini akan termasuk pungutan yang diterima daripada peringkat awal projek-projek tersebut walaupun sebelum Surat Sampingan dan PT wujud. Berdasarkan tafsirannya plaintif menginvoiskan defendan untuk komisennya tetapi apabila defendan gagal

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

untuk bertindak balas kepada peringatan-peringatan untuk pembayaran dia memfailkan tindakan ini.

Diputuskan, menolak tuntutan dengan kos:

(1) Pihak-pihak tidak dan tidak mungkin berniat untuk memasukkan pungutan yang mana telah dibuat berkaitan Park 7 dan projek-projek Troika kerana pungutan tersebut bukan lagi 'debts'. Jumlah terhutang yang relevan telah dibayar dan dipungut oleh defendan. Tujuan kerjasama di antara pihak-pihak pada kesemua masa adalah mengenai pungutan hutang. Oleh itu, perkara mengenai wang yang telah dipungut sebelum PK dan Surat Sampingan tidak mungkin berada dalam pertimbangan pihak-pihak (lihat perenggan 45).

(2) Skop atau tujuan PK adalah untuk meminda perjanjian yang ada di dalam Surat Sampingan. Memandangkan senarai hutang lapuk di dalam Surat Sampingan telah memasukkan wang yang diinvoiskan yang mana tertunggak di bawah kedua-dua Park 7 dan projek-projek Troika, terma-terma 'complete' dan 'over the full duration' hanya boleh merujuk material dan item yang telah hilang, rosak, tidak dipulangkan semula atau tidak dibayar oleh pelanggan ke atas tempoh penuh projek-projek tersebut. Tidak terdapat kekeliruan atau keraguan dalam fikiran kedua-dua pihak terhadap subjek perkara di bawah perundingan dan keputusan (lihat perenggan 32 & 44).

(3) Tidak dijumpai di mana-manapun di dalam testimoni plaintif sendiri yang dia menegaskan atau menuntut bahawa defendan diwakilkan dan bersetuju dengannya bahawa dia akan dibayar walaupun untuk pungutan yang telah dipungut. Oleh itu, ia sudah tentu tidak boleh menjadi subjek untuk apa-apa persetujuan atau perjanjian (lihat perenggan 46).]

Notes

For cases on objective intention of contract parties, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5101–5102.

Cases referred to

Attorney General of Belize and others v Belize Telecom Ltd [2009] UKPC 10, PC (refd)

Berjaya Times Square Sdn Bhd (fomerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2006] 3 MLJ 1; [2006] 2 CLJ 409, CA (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1997] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

Glamour Green Sdn Bhd v Ambank Bhd & Another Appeal [2007] 3 CLJ 413, CA (refd)
Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544; [2007] 2 CLJ 127, CA (refd)
Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29; [1978] 1 LNS 117, FC (refd)
Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 5 MLJ 501; [2007] 4 CLJ 725, FC (refd)
Scammei v Ouston [1941] 1 All ER 1411, HL (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157,; [2008] 4 CLJ 217, CA (folld)
Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo (suing on behalf of Ng Hua's estate, deceased) [2010] 3 MLJ 633; [2010] 5 CLJ 427, CA (refd)
Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81, CA (refd)

Legislation referred to

Contracts Act 1950 s 30
Evidence Act 1950 ss 92, 92(f), 114(g)

Colin Pereira (Yasotha Sooriyamurthi with him) (Goh Wong Pereira) for the plaintiff.
Gerard Louis Ambrose (Adriana Leu with him) (Chooi & Company) for the defendant.

Mary Lim J:

BACKGROUND FACTS

[1] The defendant is a wholly-owned subsidiary of PERI GmbH, a company based in Germany. It is in the business of providing engineered formwork solutions to its customers who generally comprise large contractors and developers. Formwork is actually the temporary mould used to form concrete columns, walls, decks, tunnels, bridges and the like. The defendant rents out this formwork to its customers who make monthly payments for such formwork. Upon completion of projects, the customers returned the formwork to the defendant. In the event the formwork is damaged or lost during the period of rental, a charge either for repairs or a sale by loss or a 'replacement charge' is levied.

[2] The plaintiff is a German citizen. He was the managing director of the defendant between 1999 and 23 February 2010. According to the plaintiff, on

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

18 January 2010, Mr Craig Robert Barkley (DW1), the area or regional Manager of Peri GmbH asked to see the plaintiff at his hotel. When he arrived at the hotel, DW1 met the plaintiff together with one Mr Schmitz, the HR manager from Germany. At that meeting, DW1 informed the plaintiff that 'due to the 'change of generations' in the company management', the plaintiff had to resign and hand over the management of PERI Formwork (M) Sdn Bhd to his successor, Mr Cristian Tort (DW2). This change in company management appears to have been due to the passing of the former chairman and owner of PERI GmbH who had hired the plaintiff in 1989.

[3] A mutual agreement with the defendant's parent company, PERI GmbH was then drawn up and signed by both the plaintiff and PERI GmbH on 12 February 2010. This agreement shall henceforth be referred to as the 'Mutual Separation Agreement' or 'MSA'. The plaintiff duly resigned with effect from 23 February 2010 in both his capacity as an employee and member of the board of directors of the defendant. Pursuant to cl 3 of the MSA, the plaintiff received €304,570 as 'compensation payment for the loss of his employment'. There are other terms in that MSA but it is of no concern for the purposes of this claim.

[4] It appears that the defendant had outstanding debts from its various customers amounting to RM4,424,813. These debts were due and owing past 60 days. These debts arose during the plaintiff's tenure of employment with the defendant. The defendant decided to seek the plaintiff's assistance in recovering these debts which it referred to as its 'old debts'. In return for the plaintiff's efforts, the defendant agreed to pay the plaintiff a 15% commission for any of his efforts which led to the defendant recovering on those old debts. So, on the same date as the MSA, the plaintiff and the defendant entered into another agreement on this collection. This agreement can be found in the defendant's letter dated 12 February 2010 (side letter). This letter states as follows:

> Dear Mr. Schleich,
>
> PERI Formwork Malaysia Sdn Bhd
>
> Old Debts
>
> ---
>
> We refer to your recent resignation from the Board and as Managing Director of the Company.
>
> As discussed with representative of the company's shareholders, namely Craig Barkley and Sven Schmitz on 12 February 2010, we confirm that there is a total sum of RM4,424,813 due and owing past 60 days from various third party debtors of the company. These were based on the business of the company during your tenure ('Old Debts'). The details of these Old Debts are set out in columns 'A' and 'B' of the attached document called PERI Formwork Malaysia Sdn Bhd - Overdue Analysis.

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

> Further, as discussed during the meeting, this is to confirm that; should your efforts lead to the company receiving payment of these Old Debts unconditionally before 1 January 2011, the company shall pay you a sum equivalent to 15% all such Old Debts recovered by the company before 1 January 2011. Any sums payable to you as a result of such recovery by the company shall be paid to you within two months from the date the company receives any such Old Debts.
>
> As also discussed, whilst you may make efforts to recover the said Old Debts, you are not authorised to represent the company, PERI GmbH or any PERI entity, expressly or impliedly in any manner. At no time should you even suggest or indicate, expressly or impliedly, that you represent the company, PERI GmbH or any PERI entity.
>
> Please confirm your understanding by signing and returning the duplicate of this letter.
>
> Yours faithfully,
>
> .....
>
> YOU SEWE WAN
>
> Director
>
> .....
>
> I, Helmut Schleich (Passport No: …), confirm my understanding and agreement to the terms of the letter above.
>
> .....
>
> Helmut Schleich

[5] The plaintiff signed accordingly and it is not disputed that the plaintiff's efforts led to the defendant's successful recovery on the old debts. It is also not disputed that the defendant paid the plaintiff a total of RM403,517.25 for his efforts.

[6] The defendant was extremely pleased with the plaintiff's efforts. So much so that DW1 emailed the plaintiff on 7 June 2010 at 1914 hours to not only express his pleasure and appreciation of the plaintiff's efforts; but to explore and propose new collaborations; developing on from an idea first introduced by the plaintiff. And, that is in respect of 'equipment that still had not been returned from several sites'. This is what DW1 said in his e-mail:

> Hello Helmut,
>
> Darren and I have been in contact regarding the general progress in respect of old debt:
>
> PARK 7
>
> I am delighted to hear that we have recovered most of the outstanding debt from the Park 7 project [RM316k out of RM350k]. In respect of the material that was not recovered and written off, is there a chance that we could still obtain a payment for

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

this material? Or was the write off already discussed with the customer? If you see that a chance still exists to raise an invoice for this lost material, the company will be prepared to include anything recovered into our standard commission arrangement. Please let me know either way.

TROIKA

Further discussion and thought over this project has prompted us to include 'all' outstanding amounts into our standard commission arrangement and not just that which is reflected in column A and B. We trust that this arrangement will provide you with an added incentive to assist us recover outstanding sale, rental and sale by loss funds for the project in its entirety. Please can you provide me with your comments thereof?

Best regards,

Craig Barkley

Regional Management South-East Asia

[7] In respect of the Park 7 project, it was for materials that had not been recovered and written off or 'lost material'; whilst for the Troika project, it was to recover 'outstanding sale; rental and sale by loss funds for the project in its entirety'. The plaintiff accepted the defendant's proposition vide his e-mail dated 8 June 2010 sent at 2036 hours:

Hello Craig,

thank you very much for your email and your confidence into my services. I will try my very best to recover the maximum for PERI Malaysia. Please allow me to highlight a few topics in order to optimise the efficiency of our coordinated efforts.

Agreement

You do understand that such changes require a proper form signed by authorised people. Kindly amend the previous agreement accordingly. I shall be able to schedule the next meeting with IJM once the new agreement has been signed.

Responsibility

During the negotiations you have confirmed that nobody will interfere before the end of the agreed term. Kindly inform Cristian about this agreement. It was absolutely unnecessary to give additional discount to Edar Maxima on old debts in order to 'buy' the new Tesco project. While I have entertained the management on my expenses Cristian has negotiated with them without telling me anything. As you are aware this fees on collection of old debts are an important part of my severance payments. Such incidents should not happen. Don't underestimate Malaysian clients. They will abuse such situations.

Updates

Our agreement does state that PERI will provide me with relevant figures. Please make sure that such figures are provided regularly, best weekly. Until today I haven't received any information regarding payments received.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

Project Files

It is very difficult to negotiate with clients not having access to correspondence, contracts, data and memos. Kindly give me access to the complete correspondence and data of the projects.

PARK 7

According to the latest statement the amount of RM266,889.62 has not been invoiced yet. IJM does request a 50% discount on that amount. This discount looks reasonable to me considering approximately 20% discount on used materials and additional 30% accumulated rental of the lost items. I suggest to invoice 50% of RM266,889.62. Kindly let me have your opinion on that. I have no idea where the difference between RM350k and RM316k come from. Please advise PERI Malaysia to give me an update on this.

TROIKA

The problem here seems to be almost completely home made. While we are waiting for IJM to pay, IJM is waiting for data from PERI which cannot be provided because the new PSD system cannot produce them. Please use your influence to help us here.

Looking forward to hearing from you soon.

Best regards

Helmut Schleich

[8] DW1 did not respond immediately to the plaintiff's e-mail because he was 'away on vacation'. On his return, he emailed the plaintiff on 18 June 2010 at 1520 hours where he said:

Hello Helmut,

Please accept my apologies for not responding earlier, I have been away on vacation. Sven Schmitz and I will discuss the open points with both Cristian and Darren and respond swiftly.

Best regards

Craig

[9] All these e-mails culminated in the preparation and signing of what is referred to as 'the supplementary agreement'. That agreement is actually housed in a letter dated 7 July 2010 sent by the defendant. The letter which bears the plaintiff's signature states as follows:

Dear Mr. Scheich,

Amendment

PERI Formwork Malaysia Sdn Bhd

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

Old Debts

(Date: 12 February 2010)

An amendment is made to our current agreement with you as follows:

> Standard commission to apply to the 'complete' collection for 'TROIKA' and 'PARK 7' (not just for the old debt). This will include for the collection of all funds in respect of rental; purchase; transport; cleaning/damage charges and sale by loss (lost equipment) over the full duration.

Please see attached up dated spread sheet listing the relevant sites and outstanding values pertinent to our agreement.

Steps to be followed:

(1) Helmut Schleich (HS) to keep Cristian Tort (CT) informed of all intended meetings prior to meeting with the customer (where an overlap could occur, CT to do likewise)

(2) All collection information to be relayed to CT for and copied to Darren Wong (DW)

(3) Where applicable, CT to approve commission payments and instruct DW to proceed in accordance with the agreement

(4) Any dispute in respect of this agreement to be discussed with the Craig Barkley

Please confirm your understanding by signing and returning the duplicate of this letter.

Yours faithfully

.....

YOU SEWE WAN

Director

I, Helmut Schleich (Passport No: …), confirm my understanding and agreement to the terms of the letter above.

.....

Helmut Schleich

[10] The plaintiff signed this letter thereby confirming his understanding of the contents of this letter. The plaintiff claimed that by virtue of this supplementary agreement, the parties had agreed that the plaintiff be paid 15% commission not just for the old debts but on the complete collection for the two projects of Troika and Park 7 over their full duration. The total payment collected for Troika was RM2,863,996.22 for which the plaintiff was entitled

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

to RM429,599.43 as commission. The total payment collected for Park 7 was RM7,524.013.79 where the plaintiff's commission was the sum of RM1,128,602.07. The plaintiff then issued an invoice dated 21 March 2011 to the defendant for the sum of RM 1,558,201.50 as total commission due and owing in respect of sums received by the plaintiff before 24 May 2011. The defendant received the invoice but did not respond.

[11] By letter dated 19 April 2011, the plaintiff reminded the defendant of his claim for RM1,558.201.50. Again, although received, the defendant did not respond to this letter until 25 April 2011 when referred to both the plaintiff's two letters of 11 April 2011 and 19 April 2011 and denied liability.

[12] On 27 April 2011, the plaintiff sent the defendant another letter once again reminding the defendant of his claim. That, too, did not secure any payment from the defendant. The claim was then filed on 8 August 2011.

SUBMISSIONS

[13] Mr Colin Pereira, learned counsel for the plaintiff submitted that there was nothing unclear or ambiguous about the terms in particularly the supplementary agreement. On the facts, it was 'so plain and clear that the ordinary meaning' of the term 'complete' refers to not just the old debts but the collections for the full duration of the Troika and Park 7 projects. When the meaning is so plain and clear, the court will not impose any implied terms as was reminded by the Court of Appeal in *Seven Seas Industries Sdn Bhd v Phillips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157; [2008] 4 CLJ 217.

[14] Mr Pereira argued that the defendant had been given plenty of opportunities to set the records straight; at least thrice after the demand letters were issued. Yet, it failed to do so suggesting that the arguments now canvassed by the defendant are more in the nature of afterthoughts as opposed to the true intentions of the parties at the material time.

[15] The plaintiff also urged this court to apply the *contra proferentum* rule against the defendant if the term is said to be capable of two constructions; one favouring the plaintiff, the other favouring the defendant. Relying on the Federal Court decision in *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29; [1978] 1 LNS 117, the construction that read in the plaintiff's favour ought to be preferred since the letters were all prepared by the defendant.

[16] The plaintiff next invoked s 114(g) of the Evidence Act 1950. It was argued that if the court was minded to admit oral evidence to explain the contents of these two critical documents, then the fact that the defendant failed

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

to call the signatory of these letters must also be taken into account. The defendant had called two witnesses, namely Mr Craig Robert Barkley (DW1), the regional manager for South East Asia; and Mr Cristian Tort Treido (DW2), the managing director of the defendant. Since these letters were signed by one Miss You Sew Wan who was the director absolutely authorised and mandated by the board of the defendant to negotiate the terms of the supplementary letter, then she ought to have testified for the defendant. The failure to call this principal witness warrants the drawing of an adverse inference under s 114(g) of the Evidence Act 1950 as was held by the Court of Appeal in *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1; [2006] 2 CLJ 409. It was also urged upon the court to reject DWI's explanation that Miss You was a nominee director for want of evidence. Alternatively, there was no board resolution authorising DW1 or any other person to negotiate the terms in the supplementary agreement. His evidence should therefore be rejected.

[17] Mr Gerard Louis Ambrose, learned counsel for the defendant made the following submissions and I shall highlight the main arguments only. First, he urged the court to find that the supplementary agreement is void for uncertainty under s 30 of the Contracts Act 1950. It is void because the meaning of the critical phrase in that letter, 'complete collection' cannot be discerned, and is not capable of being discerned or made 'certain'.

[18] Alternatively, if the court was to find that the supplementary agreement is valid, learned counsel suggested that the term ought to be resolved by reference to oral evidence admitted under proviso (f) to s 92 of the Evidence Act 1950. Proviso (f) allows oral evidence to prove any fact 'which shows in what manner the language of a document is related to existing facts'. In this sense, learned counsel urged the court to accept DWI's explanation as to the background and circumstances of the supplementary agreement. That as a result of the plaintiff's success in collecting the old debts, the parties agreed:

(a) on collecting on the services rendered and materials provided to customers but for which invoices had not yet been raised;

(b) that the defendant was prepared to pay the plaintiff for anything recovered; and

(c) that the defendant would pay the plaintiff the commission as applied for the recovery of the old debts.

[19] It was further argued that the parties could not have intended that the plaintiff be paid for moneys already paid to the defendant before the end of 2010 and before the existence of the side letter and the supplementary agreement because there were still 'steps to be followed'. These steps involved the plaintiff keeping DW2 informed of all intended meetings prior to meeting with the customer; that all collection information was to be relayed to DW2

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

and copied to PW2; where applicable, DW2 was to approve commission payments and instruct DW2 to proceed in accordance with the agreement; and any dispute in relation to the agreement was to be discussed with DW1. Since DW2 only joined the defendant after the supplementary agreement was made, the parties could not have intended the payment of the commission for the collections already made prior to even the side letter. The defendant also suggested that if it was the intention of the parties to include these prior collections, the parties would simply have expressly reflected this in the supplementary agreement.

[20] It was the further argument of the defendant that the plaintiff had not in any case, duly satisfied his obligations under the supplementary agreement. The steps mentioned in that agreement had not been followed by the plaintiff. Most importantly, there was no collection or receipt of payment before the dateline agreed which would have triggered the defendant's obligation to pay the plaintiff. Finally, the defendant argued that the principle of estoppel could not be relied on here because an appreciation of the full facts and circumstances will show that the defendant had indeed disputed the invoice as a whole.

THE FINDINGS

[21] The parties had identified five main issues to be tried, namely:

(a) whether, pursuant to the mutual agreement with the defendant's parent company, PERI GmbH entered on 12 February 2010 (MSA) all employment and termination of employment based claims were mutually settled for both PERI GmbH and the defendant;

(b) whether the supplementary agreement as defined in the agreed facts dated 6 December 2011 (supplementary agreement) is void for uncertainty;

(c) if the supplementary agreement is not void for uncertainty,

(i) what the terms of the supplementary agreement are;

(ii) whether the plaintiff has duly satisfied his obligations under the supplementary agreement;

(iii) whether the defendant derived any benefit pursuant to the supplementary agreement;

(iv) whether the plaintiff is entitled to the sum of RM1,558,201.50 being the commission of 15% payable for the 'complete' collection for 'Troika' and 'Park 7' projects (not just for the old debts) including the collection of all funds in respect of rental, purchase, transport, cleaning/damage and sale by loss (lost equipment) over the full duration;

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

(v) whether the sums of RM2,863,996.22 (Park 7 project) and RM7,524,013.79 (Troika project) received by the defendant on or before 31 December 2009 form the subject matter of the supplementary agreement; and

(vi) whether the supplementary agreement is a 'contingent contract' and whether the contingency has been satisfied.

(d) whether there is a total failure of consideration on the part of the plaintiff in seeking to enforce the supplementary agreement between the plaintiff and the defendant; and

(e) whether the failure on the part of the defendant to dispute the purported invoice issued by the plaintiff followed by the various reminders sent by the plaintiff raises an estoppel against the defendant from disputing the plaintiff's claim.

[22] I do not propose to answer each issue as identified because the issues are in fact inter-related. From the claim and the submissions made, I observe that the first issue is not actually up for consideration. Furthermore, it is quite clear from the evidence led and the submissions made that this claim is not about the payment of commission in respect of the old debts. For those collections, it is not disputed that the plaintiff has been paid for his efforts.

[23] It is appropriate to add here that there is no suggestion by any of the parties that despite the plaintiff following the steps enunciated in the supplementary letter, the defendant failed to pay the commission agreed. It is further appropriate to add that the plaintiff's claim is not about the defendant's collections made before 1 January 2011 in respect of the materials, items or equipment mentioned in the supplementary agreement.

[24] This claim is really about the total collections of the defendant in respect of two projects known as 'Troika' and 'Park 7' made over their full duration. This will include collections made from the outset of those projects that would involve the two sums mentioned in issues c.iv and c.v above where the sums were collected as far back as 2009, before even the two agreements were made. The plaintiff claimed that this was the intention of the parties as evinced by the terms in the supplementary agreement when the term 'complete' was used — that the parties intended the plaintiff to be paid commission for the complete collections from both projects.

[25] Upon a close and careful scrutiny of the two critical letters that underpin the agreement between the parties, and after a careful consideration of the submissions and evidence led at trial, these are my findings.

[26] First of all, the guidelines in the interpretation and construction of

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

agreements. The courts do not take literal semantic approaches or construe words by reference to 'precise, etymological, philosophic or scientific meaning'. This has been repeatedly reminded by the Federal Court and the Court of Appeal. See for instance *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29; [1978] 1 LNS 117, *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544; [2007] 2 CLJ 127 and *Glamour Green Sdn Bhd v Ambank Bhd & Another Appeal* [2007] 3 CLJ 413. Further, as expounded in the decisions of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 and *Berjaya Times Square Sdn Bhd (fomerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597, the courts frequently look for the substance of the agreement or the factual matrix forming the background of the transaction between the parties in order to determine the true nature of object of the agreement or transaction. This generally means that the subjective intent of parties will be disregarded in favour of an objective evaluation of the parties' intent or purpose in entering into the bargain in the first place.

[27] Yet, another guideline to be borne in mind when conducting such an exercise is to remember that in agreements of this nature, the courts apply a commercial common sense approach. Indeed, it will be seen that the courts lean in favour of upholding bargains made between the parties and are generally slow in striking down arrangements unless these arrangements are void. It is further wrong to take particular words or terms from any agreement, ascribe a meaning to it and readily conclude that meaning so ascribed is conclusive. In *Berjaya Times Square Sdn Bhd (fomerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597 at p 621, Gopal Sri Ram FCJ cited a then recent decision by Lord Hoffman in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 that:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonable be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[28] Once this exercise is undertaken, the backdrop, context, circumstances or conditions against which the words are used will lend meaning, effect,

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

colour, purpose, nuance and the like to those words. In turn, this will help in the proper determination of the parties' intention which is so vital to the resolution of disputes between parties.

[29] Dealing next with the contention that the supplementary agreement is void for uncertainty under s 30 of the Contracts Act 1950. The defendant argued that the terms or contents of this letter are uncertain; or the terms were not capable of being made certain in which case the agreement is void. The Court of Appeal had opined in *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81 that the courts will not lend aid to enforcement of an incomplete agreement. Similar views can be found in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd*; *Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 5 MLJ 50; [2007] 4 CLJ 725; *Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo (suing on behalf of Ng Hua's estate, deceased)* [2010] 3 MLJ 633; [2010] 5 CLJ 427.

[30] I respectfully accept the arguments of the defendant as sound if the terms in the supplementary agreement indeed were not capable of meaning; or they were so ambiguous to be devoid of meaning such that it was impossible to discern or ascertain the meaning of those terms and thereby give effect to the intention of the parties. Where the exercise results in negative responses to this sort of questions and where the court cannot safely conclude that exercise, then the agreement must be declared void. In such an event, 'the court has no choice but to say that there is no contract' — *Scammell v Ouston* [1941] 1 All ER 14 where Lord Weston said that:

> The object of the court is to do justice between the parties and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.

[31] Having considered the terms of the side letter and the supplementary agreement, it is my respectful view that there are sufficient details or information to determine the meaning and intention of the parties. It is a well established principle that the court cannot, impose terms where the terms in the supplementary agreement are clearly unambiguous — *Seven Seas Industries Sdn Bhd Philips Electronics Supplies (M) Sdn bhd & Anor* [2008] 5 MLJ 157. That is and has never been the function of the court. This supplementary agreement is not void, be it for uncertainty or any other cause. I shall proceed

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

to explain my reasons for saying so as well as to determine the meaning and intent of the parties with respect the supplementary agreement.

[32] To start with, the supplementary agreement must be read in its entirety; and not piece-meal. In my judgment, the parties themselves actually had identified the scope or purpose of this supplementary agreement. It was to amend the current or existing agreement found in the side letter. This was entirely possible as that agreement was still in its execution or implementation stage. The cut-off date, at all times, would be 1 January 2011.

[33] Although the dispute is not about the side letter but the supplementary agreement, the terms of this side letter must first be understood and appreciated. Otherwise, it would be almost impossible to figure out the meaning and intention of the supplementary agreement which is really an agreement amending this side letter. In any case, the two agreements need to be put alongside each other in order to understand its meaning and know the intention of the parties. This is quite obvious from the way the parties have themselves captioned this supplementary agreement as 'Amendment PERI Formwork Malaysia Sdn Bhd Old Debts (Date: 12 February 2010)'. In the opening words of this agreement, it is also clearly stated that it is 'An amendment is made to our current agreement with you as follows'.

[34] The side letter is unequivocal in its intent, meaning and application. The parties clearly intended that the plaintiff's efforts in the defendant's recovery of the old debts of RM4,424,813 would be recognised and compensated. The details of this sum can be found at columns A and B in an attached document to the side letter known as 'PERI Formwork Malaysia Sdn Bhd — Overdue Analysis. For the plaintiff's efforts, the defendant would pay a sum equivalent to 15% of all such old debts which are collected before 1 January 2011. This payment is unconditional. The defendant further agreed to pay the plaintiff such monies within two months from the date the defendant received payment under the old debts.

[35] Next, it must be appreciated that this supplementary agreement was reached approximately mid-way through the operation or implementation of the side letter. DW1 testified that as the regional manager of PERI GmbH, his job involved interfacing between the headquarters of PERI GmbH and its subsidiaries which included the defendant. He informed the court that he 'constantly monitored and managed the progress in respect of the collection of the old debts (pursuant to the side letter) and had been in communication with both the plaintiff and the defendant'. He told the court that he 'was pleased with the progress the plaintiff made which benefitted both the plaintiff and the

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

defendant in respect of the collection of the old debts'. This testimony of the defendant is reflected in the exchange of e-mails between the parties and which have already been set out earlier.

[36] From the evidence presented, it would not be wrong to say that the defendant was relying on the experience and contacts of the plaintiff in collecting these old debts under the side letter. This makes good, business sense and really comes as no surprise as the plaintiff was no ordinary employee of the defendant or the defendant's parent company. He was the defendant's former managing director and had helmed that post for some ten odd years before his cessation of employment. During his period of tenure, particularly in that position as managing director, it is certainly reasonable to say that the plaintiff must have enjoyed a measure of goodwill, confidence or rapport with the customers. In fact, there is some testimony from the plaintiff to this effect. The plaintiff had related his familiarity with one the defendant's main customers, IJM — 'The head of IJM is a personal friend of mine'. The defendant must have considered tapping into that goodwill, confidence or rapport for the purpose of realising its debts or old debts that the plaintiff was ever approached in the first place. In exchange and as an incentive, the defendant was willing to pay the plaintiff 15% commission on the terms found in the side letter. As it turned out, that move by the defendant proved well-placed. The plaintiff's efforts did indeed lead to the defendant collecting on the old debts.

[37] The supplementary agreement appears to be a direct consequence of these successful efforts of the plaintiff that occasioned the parties to explore 'new' collaborations or arrangements between them. It is in this spirit that the parties revisited their 'current' or existing arrangement with a view to adding another aspect hitherto not considered by the parties. That new collaboration added a scope or aspect of debts that would spell the payment to the plaintiff of the same standard commission as found in the side letter.

[38] The amendment was clearly intended to achieve that objective, which is to extend the scope of collections for which the plaintiff would be eligible for payment of commission. The collections that now come within the purview of the two agreements would not only be the old debts as defined in the side letter but include the matters set out, which is 'all funds in respect of rental; purchase; transport; cleaning/damage charges and sale by loss (lost equipment) over the full duration'. This additional cover would then 'complete' the collections for Troika and Park 7. I pause here to mention that I do not put much stock to the defendant's deployment of the term or phrase 'un-invoiced materials'. This is merely for the purposes of identification and no more. The parties clearly knew all along what items were under discussion.

[39] While the plaintiff may have been the first person to have broached the

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

idea of other collections from several customers (through his telephone conversation with DW1); it was DW1 who followed it up with the plaintiff as seen from the trail of e-mails mentioned earlier. These e-mails give context and provide vital material matrix in discerning the intentions of the parties at the relevant time. These e-mails clearly show that the parties were dealing specifically with the Troika and Park 7 projects only — 'Subject: PARK 7 & TROIKA'.

[40] From DW1's e-mail dated 7 June 2010, in relation to the Park 7 project, DW1 asked the plaintiff about 'the material that was not recovered and written off for 'Park 7', whether:

> In respect of the material that was not recovered and written off, is there a chance that we could still obtain a payment for this material? Or was the write off already discussed with the customer? If you see that a chance still exists to raise an invoice for this lost material, the company will be prepared to include anything recovered into our standard commission arrangement. Please let me know either way.

[41] In relation to 'Troika', DW1 indicated that 'further discussion and thought has prompted us to include 'all' outstanding amounts into our standard commission arrangement and not just that which is reflected in column A and B'.

[42] The plaintiff's response was positive. He told DW1 that he 'will try my best to recover the maximum for PERI Malaysia'. He then spelt out some 'topics in order to optimise the efficiency of our coordinated efforts'. DW1 subsequently replied that he would be meeting with Sven Schmitz 'in order to make the relevant amendments to your agreement' and that he would be discussing 'the open points with both Cristian and Darren and respond swiftly'. I believe the 'open points' relate to the topics identified by the plaintiff for optimisation of the 'efficiency of our coordinated efforts'. All this culminated in the drawing up of the supplementary agreement by DW1 which is really a letter dated 7 July 2010 from the defendant to the plaintiff. It is in this context and under these circumstances that the term 'complete' collection for 'TROIKA' and 'PARK 7' and over their full duration must be understood.

[43] From this exchange, it would appear that the defendant was this time seeking the plaintiff's further assistance to recover 'lost material' and 'outstanding sale, rental and sale by loss funds' in both the Troika and Park 7 projects. According to DW1, the 'old debts were incurred based on business of the defendant during the plaintiff's tenure as employee and officer of the defendant'; that the 'outstanding receivables was an ongoing struggle, one which demanded my personal involvement. The Troika project was indeed the largest receivable', the defendant has also referred to these materials or items as

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

'un-invoiced' materials in the defence and in the testimonies of the witnesses. The plaintiff argued that this is an afterthought.

[44] Since the list of old debts in the side letter had already included monies due from or under both Park 7 and the Troika projects (where surely invoices must have been issued or raised so that collections could be made); the terms 'complete' and 'over the full duration' can only refer to all those materials and items which are lost, damaged, have not been returned or have not been paid for by the customers over the full duration or entire period of the Troika and Park 7 projects. In my view, the use of the term 'un-invoiced' is merely a description of those materials and items. Its use may be recent but it does not deter from the fact that the parties were at all times describing the same subject-matter of lost, damaged, unreturned or unpaid materials, items or equipment rented out by the defendant to its various customers. There was no confusion or doubt in either party as to the subject matter under negotiation and decision.

[45] At the material time, the parties did not and could not have intended to include the collections which had already made; that is in respect of the Park 7 project the collection of RM2,863,996.22 as at 30 January 2008; and in respect of Troika the collection of RM7,524,013.79 as at 9 December 2009. Be it at the time of the e-mails or the date of the supplementary agreement of 7 July 2010, both these collections were no longer 'debts'. The relevant dues had already been paid and collected by the defendant. Actually, they would have been paid in the ordinary course of business during the plaintiff's tenure of office with the defendant. As is apparent from the side letter and the supplementary agreement, the subject matter and purpose of the collaboration between; the parties in the first place and at all times, was all about debt collection. That being the case, the matter of collections already collected prior to the entry of the supplementary agreement and even the side letter could not possibly be said to be within the contemplation or reasonable contemplation of the parties at the relevant; especially the plaintiff himself.

[46] This is also evident from the plaintiff's own testimony. Nowhere in his evidence, especially in his evidence-in-chief did the plaintiff assert or claimed that the defendant, be it Miss You or even DW1 represented and agreed with him that he was to be paid even for the collections, already collected. Even the plaintiff did not appear to have brought the subject up. That being the case, it surely cannot have been the subject of any bargain or agreement.

[47] In his evidence-in-chief, the plaintiff testified that he is entitled to the 15% commission on old debts that had been collected even prior to 7 July 2010 because:

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

> IJM was the client in both projects that owed the defendant a large sum of money. IJM was negotiating a discount with my successor, Cristian Tort. The defendant was promised new projects in return for the discounts. I, was not invited to be part of these negotiations. Any discount given would have affected my commission as I was making every effort to collect the full sum. I discussed this with Darren Wong, the then commercial manager of the defendant. There was also concern that I may take the main client, IJM to the defendant's competitors who had approached me at that time. The head of IJM is a personal friend of mine. Darren Wong sent me an email stating that 'it is better for him to put in the agreement the whole Troika project'. This email is on page 60 of Bundle A. This was encompassed finally in the agreement of 7 July 2010. This amended agreement was sent to me via Craig Barkley's email dated 9 July 2010 which is on page 50 of Bundle A.

[48] The plaintiff further claimed to have 'dedicated most of my time into the analysis and the collection. I had numerous meetings with Darren Wong; that time the commercial manager of the defendant trying to compile the most possible collections for the company. I had many meetings with the management and the site personnel of the client. My efforts in undertaking the said collections were recognised by Darren Wong in his email to Craig Barkley dated 1 June 2010 …'

[49] Mr Wong Chee Fai (PW2) who was the commercial and admin manager of the defendant at the material time testified on behalf of the plaintiff. His testimony centered on his e-mail. This is PW2 or Darren Wong's e-mail. It reads as follows:

> Hello Mr. Schleich
>
> Yes, he asked me to send him the overdue analysis. But I told him that the overdue analysis is not complete because the collection like lost materials, RCS additional rental not invoice and etc which are not included in the overdue analysis.
>
> I told him that for troika, I will furnish the worksheet that you used for discussion once finalised to him.
>
> On second thought after I replied his email, I think it is better for him to put in the agreement 'the whole troika project'
>
> If he send me email I will talk to him.

[50] With respect, I cannot see how PW2's e-mail is of any assistance or relevance to the claim since he is not a contracting party. It is not what PW2 intended but what the plaintiff himself and DW1 understood at the material time. It may well be 'better to put in the agreement the whole Troika project', but if that was not what the parties intended or understood, then what PW2 says is entirely beside the point and of no use here. PW2's recognition of the plaintiff's efforts in collecting the outstanding debts is also immaterial as he played no determinative role.

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

[51] On the matter of the non-calling of Miss You Sewe Wan to testify; once again, I do not find that it has the effect as suggested by the plaintiff. This is because the plaintiff was himself quite comfortable throughout his dealings and negotiations with DW1, be it at meetings or through e-mails or telephone conversations. Despite his negotiations with DW1, the plaintiff was quite happy to sign letters sent by Miss You. In any case, DW1's e-mail to the plaintiff dated 9 July 2010 attaching the amendment or the supplementary agreement asked the plaintiff to sign 'the attached agreement and return it to our office in KL. The document must then be counter signed by Wendy You …'. The plaintiff did just that without any protest or worry.

[52] It is reasonable and safe to say that one of the reasons for that must have been because as a long-time employee himself who once held such an eminent position in the defendant, the plaintiff must have been very familiar with the matter of authority and mandate; that he knew that he was negotiating and dealing with the 'right' person. In any case, when the two agreements are put together, it clearly refers to the discussions that the plaintiff had with DW1 and one other. The position of the defendant's resolution does not alter this. Under such conditions, this is not a proper case to invoke the consequences of s 114(g) of the Evidence Act 1950.

[53] I am further not convinced by the arguments on estoppel. DW2 had informed the court that he had discussed the plaintiff's letters of demand with DW1, the person who negotiated and drew up the supplementary agreement. Following his answer and advice that the plaintiff's claim 'made no sense', DW2 chose to ignore the demand. Although the defendant did not immediately reply to the plaintiff's letters of demand, I accept the explanations of DW2 as reasonable, especially given the circumstances of the case and after appraising the full facts.

[54] In the matter of the pre-conditions to the plaintiff's right to the monies, I need to make just this observation. Nothing actually can be made of this since the plaintiff is not claiming for invoices raised after the supplementary agreement was made. He is claiming for those already paid even prior to the entry of the supplementary agreement and even the side letter. That being so, the conditions stipulated do not arise except say in respect of the settlement of any dispute.

[55] Having examine the supplementary agreement together with the side letter, and having appreciated the backdrop, context and circumstances and conditions against which the parties drew up the supplementary agreement, I cannot, with respect agree with the plaintiff's propositions and contentions. In the total circumstances of this case, I am therefore not satisfied that the plaintiff

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Wed Dec 26 15:09:24 2012
//caseml/case/mlj/2013_007_mlj_112

has proven his claim. The plaintiff's claim is accordingly dismissed with costs of RM25,000 as proposed by both counsel. I agree that this sum is suitable in the circumstances of this case.

Claim dismissed with costs.

Reported by Ashok Kumar